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Supreme Court of the United States

OCTOBER TERM, 1944

No. 490

BERT ERDMAN,

Libellant-Petitioner,

against

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,

Respondents.

REPLY BRIEF OF PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WARNER PYNE,
LEO J. BONDY,
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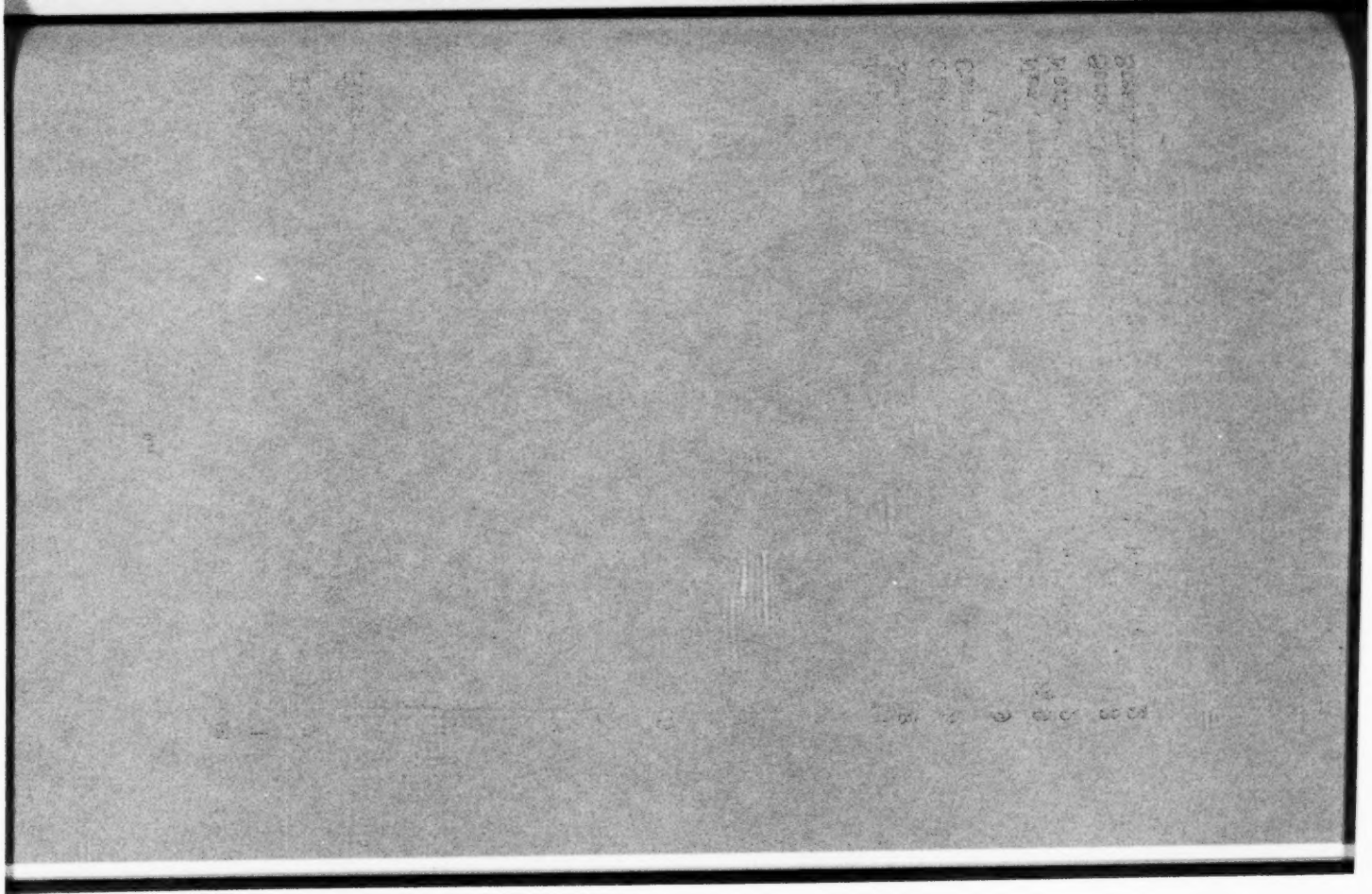
CORPORATE PRESS, INC., NEW YORK CITY



INDEX

PAGE

Conflict of Decisions 1

The Question Presented 2

Respondents' Statement of Facts Differs Materially From, and in Many Instances is at Variance With, the Findings of the District Court, and is Otherwise in Conflict With the Proof 3

I.—Respondents' duty to libellant did not end when he passed the rope and placed himself in a position of danger 8

II.—Respondents were responsible for the failure not only of the steward Jensen but of others of the ship's personnel to warn libellant 10

III.—Libellant did not assume the risks which caused his injuries 13

TABLE OF CASES CITED OR DISTINGUISHED

Arabic, The (2 C. C. A.), 50 F. (2d) 96 14
Aschenbrenner v. U. S. F. & G. Co., 292 U. S. 80 8

Chunn v. City & Suburban Ry., 207 U. S. 302 ..... 1, 2
Currico v. West Virginia Central Railway Co., 39 W. Va. 86 9

New Jersey Steamboat Co. v. Brockett, 121 U. S. 637 .. 8, 9
Norman B. Ream, The, C. C. A. 7th, 252 Fed. 409, 414 2

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 13
Steam Dredge No. 1, The, C. C. A. 1st, 134 Fed. 161 .. 2

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Conflict of Decisions.

Respondents' brief does not deny that the principle of law laid down in the majority decision of the Circuit Court of Appeals is in square conflict with the decision of this Court in *Chunn* v. *City & Suburban Ry.*, 207 U. S. 302, and the decisions of the Circuit Courts of Appeals cited in petitioner's main brief, which hold that the duty of a carrier to exercise the highest degree of care for a passenger's safety continues after the passenger has through his own act of negligence placed himself in a position of danger, known to and observed by carrier's agents.

The Question Presented.

Respondents (brief, pp. 12, 13) state that the question presented to this court is one based on the "supposed application of the doctrine of last clear chance," and that "the libellant in his brief in the Circuit Court of Appeals for the first time made some reference to the doctrine of last clear chance." These statements are both completely in error. It was not the libellant, but the respondents only, who referred in the Circuit Court of Appeals to the doctrine of last clear chance, and they did so in their reply brief at page 12. Petitioner does not here, and did not in either lower court in brief or oral argument, expressly or inferentially refer to the doctrine of last clear chance. That doctrine has no application to, and no bearing whatever, on the question of law on which libellant-petitioner relies, i. e., the proposition of law laid down in *Chunn* v. *City and Suburban Ry.*, 207 U. S. 302, and stated in Hutchinson on Carriers (our main brief, pp. 10, 11). It is the respondents only who below and here referred to, and confused the issue with, a reference to the doctrine of last clear chance. There is no occasion or reason for attempting to invoke the doctrine of last clear chance in the instant case; and respondents' error in doing so and misconception of petitioner's contention and of the evidence is apparent when it is recalled that in admiralty, where and because contributory negligence effects only a division of liability, the doctrine of last clear chance is inapplicable. (*The Norman B. Ream,* C. C. A. 7th, 252 Fed. 409, 414; *The Steam Dredge No. 1,* C. C. A. 1st, 134 Fed. 161.)

Respondents misconceive the question presented to this court. The question does not involve or concern the doctrine of last clear chance; but whether the duty of an ocean carrier to exercise extraordinary vigilance and the high-

est care for the safety of passengers is completely discharged, as the majority of the Circuit Court of Appeals held in the instant case, by the act of the passenger in negligently placing himself in a position of danger; or whether, as libellant contends, the carrier's duty still continues after the passenger has placed himself in a position of danger, and when the carrier's agents see him in such position and have ample opportunity to warn him or take some steps to protect him. As Chief Justice HAND makes clear in his dissenting opinion, the negligence of the respondents was not failure under the last clear chance doctrine, but a "failure in that extreme care which the law exacts of a carrier of passengers" (p. 908, fol. 910).

Respondents' Statement of Facts Differs Materially From, and in Many Instances is at Variance With, the Findings of the District Court, and is Otherwise in Conflict With the Proof.

The facts stated in our petition and brief, as the citations will demonstrate, are scrupulously in accord with the findings of the lower courts. The trial judge in 63 separately numbered findings comprehensively stated the facts (pp. 866-876, fols. 2598-2628); and the facts so found were amply supported by the evidence, and were not disturbed by or attacked in the Circuit Court of Appeals. There is and can be no issue or dispute of fact involved in this appeal. Yet we reluctantly but necessarily state that examination of respondents' references will demonstrate that in many instances respondents' statements are at variance with the findings and the proof, that respondents seek to reopen fact issues settled by the findings, and present an account which in many particulars is quite unfair and unjustified. For illustration we cite four specific instances:

1. Respondents' brief (p. 3) states that three witnesses testified that libellant sought to time his dive so that he would enter the pool at a time when most of the water was at his end, and cites the Kingsberg boy at page 728, Mrs. Remsen at page 415, and Patricia Farrell at page 815. We can find no such testimony either at these pages or elsewhere in the record. Not only did the Kingsberg boy say nothing whatever about a timed dive, but he twice clearly and unequivocally testified that Erdman did not dive at all, but "sort of flopped in the water" (p. 714, fol. 2142); and that he entered the water "partly on his own accord and I guess he left partly because the boat was pitching" (p. 728, fol. 2183). Mrs. Remsen, to whom the respondent next refers in support of this assertion, testified at length as respondents' principal witness that the libellant made a deep dive and was injured by striking his head on the bottom of the pool. But she gave a statement to the ship's master, which she said she herself prepared (p. 425, fol. 1274), in which she said that "the dive was a flat one that swimmers often use when going off float steps rather casually" (p. 845, fol. 2535). The District Judge expressly rejected her testimony as to a deep 45° dive, and that libellant was injured by striking his head on the bottom of the pool; and found that the libellant did not dive into the water in any such manner; that libellant was not injured by striking the bottom of the pool, as respondents contended, but was injured when he was thrown against the side of the pool (Findings 28 to 32, p. 871, fols. 2612-2613). Even if the alleged "timed dive" could fairly be spelled out of Mrs. Remen's testimony (and we submit it cannot be), we are unable to understand why respondents insist on referring to any testimony of a witness so repudiated by the court's findings, or why respondents still persist, as they do at page 4 of their brief in this court, in referring to expressly rejected evi-

dence that libellant's injuries were received by striking the bottom of the pool in a deep dive. Patricia Farrell, the third and last witness to whom respondents refer, citing page 815, in support of the assertion of a "timed dive," gave no testimony that there was any such dive.

2. Respondents' brief (p. 2) states that at the time the libellant entered the pool the water in it was swashing back and forth so that at times the bottom of the pool was visible, and that waves three feet high were being thrown a distance of four feet into the air so that they went over the top and onto the deck. This is a grossly exaggerated statement of the conditions, and is unsupported by respondents' citations. The testimony of the witness Kingsberg, cited by respondents at page 736, makes no statement such as respondents claim. On the contrary this boy, who was 11 years old at the time of the accident (p. 712, fol. 2136), testified that the water did not splash so as to uncover or expose the bottom of the pool (p. 735, fol. 2205). The District Judge referred to testimony that spray from the waves came onto the deck, and that the wind would sometimes whip the top of the water so as to make waves which one of the witnesses testified from bottom to top were 2 to 2½ feet and sometimes 3 feet high (Opinion, p. 855, fol. 2563). Obviously with 3½ to 5 feet of water in the pool (Finding 16, p. 869, fol. 2607) and the pool 9 feet 5 inches deep (p. 867, fol. 2601) waves of such height could not and did not roll onto the deck; but rather only spray, whipped by the wind. None of the witnesses testified and certainly the District Judge did not find that any waves "went over the top of the pool and on to the deck." The District Judge's finding as to condition of the water in the pool was merely that the water was in an agitated condition (Finding 18, p. 870, fol. 2608), and that "sprays were breaking out over the pool because the water was slapping

against the sides, and there were waves over the surface of the water" (Finding 26, p. 870, fol. 2610).

Respondents' reference to Mrs. Remsen's testimony (p. 415, fol. 1245) that the waves "made the bottom of the pool plainly visible" does not support respondents' assertions; for respondents' own proof was that the bottom of this pool would be visible when the water had full depth, and common knowledge makes that obvious. Respondents' witness Patricia Farrell testified that the bottom of this pool "was painted bright blue" and that "even when there was ten feet of water in it it looked like there was about three" (p. 813, fol. 2437). The findings and opinion leave no doubt that the bottom of the pool was nowhere and never exposed, and that the waves in the pool did not and could not break over the deck, but only spray.

3. Respondents' brief (p. 3) states that three passengers testified that they knew the pool was not open for use by them; but both respondents' references and other testimony show that (a) two of these passengers referred to a time an hour prior to the time the libellant entered the pool, and to a time when the pool was empty, or practically empty, and filling of the pool had just started; and (b) the third passenger gave no testimony such as respondents allege. Mrs. Remsen (p. 405, fol. 1215) stated that about an hour after lunch she looked at the pool and realized it was closed. It was not until 3:05 p. m. that filling of the pool was started (p. 508, fol. 1523); so that the pool was empty when Mrs. Remsen looked at it and realized it was closed. The second witness to whom respondents refer is Patricia Farrell, a girl thirteen years of age at the time of the accident (p. 801, fol. 2401). The testimony is clear that at 3:05 p. m. when filling of the pool started this child and other children were expressly told by the steward Jensen that the pool was not open. Jensen testified

that at 3:05 p. m., when filling started, the bridge officer called down to keep the children away, and that he, Jensen, then warned the children, and "held onto the little girl," "little Patsy" (p. 508, fols. 1523, 1524; pp. 511-512, fols. 1533, 1534; p. 513, fol. 1538). When the libellant entered the pool at 4:00 p. m., it had 3½ to 5 feet of water in it (Finding 16, 55; p. 869, fol. 2607; p. 874, fol. 2621). This same child testified that she thought at that time that it would be all right for libellant to go in, did not think he would be hurt, and "didn't think it was dangerous" (p. 821, fol. 2463). The testimony of the third witness referred to by respondents, Mr. Chenery, is devoid of anything to support respondents' assertion that he said he knew the pool was closed; and certainly he did not so testify. All he said was that he did not go into the pool because there was "some restraining influence" the nature of which he could not recall, "I can't tell you the specific reason" (p. 746, fol. 2238; p. 752, fols. 2254-5). Inasmuch as two other witnesses were restrained by cold weather, it is at least equally fair to infer that it was the cold that restrained Mr. Chenery; indeed such inference seems more fair, in view of certain findings, and the entire testimony. The passengers Michael and Hinkle did not go in because it was too cold. Michael, in his bathing trunks, sat on the edge of the pool, watching Erdman as the latter entered, and intending to follow in, if Erdman did not report the water too cold (Hinkle, p. 248, fol. 743; Michael, p. 267, fol. 801, p. 268, fol. 802, p. 269, fol. 806; Finding No. 24, p. 870, fol. 2610).

4. The statement appearing on the first page of respondents' brief that libellant knew that the pool "was closed" is unsupported by any testimony, and no such finding was made by the District Court. On the contrary the court found that "with no sign or warning of any kind,

and the pool at least partially filled with water, there was continuous invitation to passengers to use the pool, as one of the advantages of the ship" (Finding 43, p. 873, fol. 2617); and that libellant in using the pool under existing conditions "was an invitee and not a trespasser" (Conclusion 5, p. 877, fol. 2630).

Respondents' brief (p. 5) asserts that libellant requested specific findings by the District Court that Jensen was under no duty of giving any warning to libellant. That is incorrect. The trial judge stated in his opinion that Jensen had no such duty (p. 858, fol. 2573) as a reason among others for rejecting Jensen's testimony, and for holding the ship's master and officers negligent for failing properly to instruct Jensen. Proposed findings and conclusions were submitted by libellant which strictly followed the opinion (pp. 850-865), to comply with the express suggestion of the District Judge (p. 865, fols. 2594-2595), and these findings, with additional ones proposed by respondents, were adopted.

I.

Respondents' duty to libellant did not end when he passed the rope and placed himself in a position of danger.

In support of their contention that respondents as carriers discharged their full duty to the libellant when they notified him by implication through the assumed presence of the rope that he was not entitled to go into the pool, respondents cite *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, and *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 637.

The *Aschenbrenner* case involved only the question as to whether a person injured while he was attempting to

board a moving train had become a passenger within the meaning of an insurance policy. Further there was no evidence that the carrier's agents saw the passenger as he was attempting to board the train, or that they had any opportunity to warn him of the danger of doing so; in marked contrast to the cases cited in our main brief (pp. 14, 15) such as *Currico* v. *West Virginia Central Railway Co.*, 39 W. Va. 86, in which the appellate court approved an instruction of the trial court that the negligence of a train passenger in permitting his arm to extend out of the window of a car did not excuse or relieve the carrier from liability when the carrier's employee had seen the projecting arm, but had not acted quickly enough in warning the passenger of the danger.

In *New Jersey Steamboat Co.* v. *Brockett* a steamship passenger was injured in a scuffle with a member of the crew who attempted to eject the passenger from a place which ticket provisions and signs forbade him to enter. Not only was there no evidence that the carrier's agents saw the passenger when he entered the forbidden part of the ship, but it is clear that when they did discover the passenger's presence there, they not only notified him, but took affirmative action to cause him to leave. The vitally distinguishing feature of the instant case is that, although it was obvious and known to the ship's officers and some of the crew that libellant was in the act of putting himself in a position of danger, they made no effort to warn him, despite opportunity to do so.

Respondents contend (brief, p. 16) that when libellant had passed the rope which is assumed to have been in position, there was nothing further they could do to keep libellant from entering the pool except to use physical force. Libellant did not and does not now contend that physical force should be used. Libellant contends that after respondents' agents saw the libellant pass the rope

and saw that he was about to put himself in a position of danger, it was respondents' duty, not physically to prevent him from entering the pool, but to warn him of the dangers of doing so. The very fact that the libellant was about to enter the pool made, or should have made, it obvious to respondents' employees that libellant did not appreciate the full nature or extent of the danger; and as we later herein point out, there were special risks, inherent dangers as the trial judge called them, of entering this pool on this ship, of which dangers the libellant was unaware (Finding 54, p. 874, fols. 2620-1).

II.

Respondents were responsible for the failure not only of the steward Jensen but of others of the ship's personnel to warn libellant.

Respondents (brief, Point II, pp. 18, 19) seek to escape liability for the failure of the steward Jensen to give any warning to libellant not to go into the pool, on the ground that Jensen's failure in that connection was not the act of his employer because he had been given no instructions to warn, and had no duty to do so.

Jensen was the only member of the crew who respondents claim gave any warning, and the length to which respondents went at the trial to prove an express warning by Jensen to the libellant (pp. 508 to 513) in support of the pleaded defense that libellant was "advised and warned not to enter the pool" (Ans., p. 16, fol. 48); the orders from the bridge officers to Jensen at 3:05 p. m. to keep the children away from the pool (p. 508, fol. 1523); the very presence of Jensen at the pool, as the only ship's attendant there; the trip Jensen made to the bridge while the pool was being filled to ask that it be drained because the water

was splashing people on deck (p. 842, fol. 2525); his testimony early in his direct examination that "it was my duty to come out and see if they were filling up the pool" (p. 498, fol. 1494) all indicate that warning passengers was within the scope of his authority and duties. The trial judge expressly rejected Jensen's testimony as to a warning (Findings 45, 46, 48, p. 873, fols. 2618-9). That Jensen had no express instructions to warn passengers (Findings 39, 41, p. 872, fol. 2616) was a factor in disproving his testimony that he did in fact warn libellant; and was also proof of negligence of respondents in failing properly to instruct Jensen, and proof of the negligence of ship's master and other officers to issue any orders to keep passengers out of the pool, or to see that they were kept out, or to "adopt any system of looking after the safety of passengers in regard to the pool" (Finding 35, p. 872, fol. 2615; Findings 49 to 53, pp. 873-4, fols. 2619-2620).

That Jensen had not been given instructions to warn, or that it was not part of his duty to do so, does not discharge respondents from liability because, as Chief Justice HAND said in his dissenting opinion, "The ship, having stationed a steward at the place, was charged with instructing him to tell passengers not to enter" (p. 908, fol. 910).

The contention that Jensen was not authorized to warn libellant cannot be urged as an excuse in connection with the failure of the master-at-arms, Gisbart, to give such warning. He testified that his duties were to see "to the safety of the ship and the passengers" (p. 584, fol. 1752).

Appreciating it was unquestionably part of Gisbart's duties to warn passengers not to enter the pool, respondents (brief, p. 13) say that "there was no evidence that it was physically possible for him to intervene in time" to stop libellant from going into the pool. This statement is in conflict with his testimony that he saw libellant standing on the steps of the ladder leading down into the pool and

obviously intending to go into the pool (p. 599, fols. 1796, 1797). Gisbart was then standing at the forward part of the promenade deck, directly above and overlooking the pool, alongside a door at the head of an outside stairway which led directly down to the deck below, alongside the pool (p. 600, fol. 1800). All Gisbart had to do was to open this door and call to the libellant not to go into the pool; but instead of so doing he proceeded, admittedly in no hurry and taking the longer way down, by another stairway some distance in the rear inside the ship, to make his way down to the pool (pp. 600-1, fols. 1800-1) to "chase him (Erdman) out of the pool" (p. 580, fol. 1740). Admittedly he gave libellant no warning.

Not only, however, did both Jensen and Gisbart see libellant as he was about to enter the pool and have opportunity to warn him not to do so, but the ship's officers also saw or should have seen libellant about to enter the pool and should have given him some warning. Alexanderson, a licensed master, was the officer on watch on the bridge (p. 754, fol. 2261), assisted by the junior third officer, two quartermasters, and a lookout (p. 757, fol. 2269). He testified those on watch on the bridge "could see the pool very distinctly" (p. 758, fol. 2274); that he looked at it continually (p. 761, fol. 2283); and that he "was looking at it all the time" (p. 779, fol. 2336). At 3:05 P. M. one of these bridge officers called to the steward, Jensen, to keep the children away from the pool (p. 508, fol. 1523); yet no such warning was given to, or attempted to be given to, Erdman. The duty resting upon the carrier to warn a passenger who has placed himself in a position of danger applies not only in situations in which the carrier's agents actually see, but also in which they should see the passenger in the dangerous position (Hutchinson on Carriers, 3rd Ed., Vol. 3, Sec. 1173, p. 1368).

III.

Libellant did not assume the risks which caused his injuries.

Respondents contend not only that libellant assumed the risk of his injury when he passed the rope and entered the pool, but assumed every possible risk, and cite cases (brief, pp. 20, 21) which are all actions at law between master and servant in which the defective conditions existed for a considerable time and were as well, if not better, known to the servant as to the master. No such situation existed in the instant case. Still further these actions at law on assumption of risk are inapplicable in this admiralty suit, for as Mr. Justice STONE recently said in *Socony-Vacuum Oil Co.* v. *Smith,* 305 U. S. 424, "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in conformity with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

Assuming the rope was up, the most that can be claimed is that it was notice to libellant not to go into the pool, but it told him nothing else. It may well have meant to him merely that since the pool was only half filled, he should not make the deep dive which respondents urged and which the trial court rejected as the cause of libellant's injuries; and if the rope notification meant only that, libellant should be excused if he believed that there would be no danger in taking the shallow dive he did take. The presence of the rope might also have meant merely that the agitated water in the pool might buffet him about, and in that case libellant should be similarly excused if he believed he could handle himself all right in the water. Libellant did not know and could not possibly know that this ship had an unusual

propensity for pitching, which her chief officer testified she was noted for (p. 633, fol. 1898). The testimony of the Kingsberg boy establishes the effect of this pitching. He said that, "he was swimming around a little, *and the boat took a big lurch, the boat was pitching, and it took a big lurch,* and a wave got in the pool and knocked him against the side on his back" (p. 714, fol. 2142, italics ours). The District Judge referred to libellant's statements that "the ship lurched" and that "the boat swerved" causing him to hit the parietal area of his head against the side of the pool (Opinion, p. 855, fol. 2565); and found that "libellant's head struck against the side of the pool, as he himself testified" (Finding 33, p. 872, fol. 2614).

Land passengers travelling ashore may be reasonably well acquainted with conditions existing on land vehicles, such, for instance, as the dangers incident to riding on a platform, or leaving an arm partially out of the window of a moving train, so as to charge them with full knowledge and appreciation of the risks involved. Conditions at sea or on vessels are another and different matter, and it is settled law that landsmen passengers are neither required nor expected to have knowledge of, or anticipate the effect of the action of the seas or wind on a vessel or the results which may be expected from the rolling or pitching of a vessel. Ocean carriers and the officers and crew of a vessel are, however, required to have such knowledge, and to afford every protection to passengers in making such dangers known to them, and making them known in such a way as to bring home to them a full appreciation of them. *The Arabic* (2 C. C. A.), 50 F. (2d) 96, so held, and respondents (brief, p. 17), attempting to distinguish that case, state that in that case the vessel was "about to enter a hurricane". The facts of the case are contrary to this assertion. The vessel was not about to enter a hurricane, but was actually in a hurricane. We quote from the Dis-

trict Court opinion, to which the Circuit Court of Appeals referred for a correct statement of the facts, that the hurricane caused "tremendous seas", which broke over and enveloped "the entire ship". In such conditions the Circuit Court of Appeals held (Opinion, p. 99) that a warning to a passenger not to sit at the forward end of A deck was not a warning not to sit at the after end of the same deck, because the warning was not such as to "bring home to these inexperienced travellers an appreciation of their danger." Manifestly, hurricane waves of such violence, breaking over the entire ship, produced a danger which was much more obvious to the "Arabic" passengers than the danger resulting from the comparatively mild pitching and rolling of the "California" in the instant case and the resulting agitation of the water in the pool. The mere presence of a rope across the top of the steps, while an indication that the pool was not to be used, was not the type of warning required under the "Arabic" to bring home to libellant an appreciation of the inherent dangers of going into the pool.

Respectfully submitted,

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